



National Labor Relations Board

Weekly Summary of NLRB Cases

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VISIT WWW.NLRB.GOV FULL TEXT
CASES SUMMARIZED

Asbestos Workers Local 84	Bedford, OH	1
Baptist Hospital of East Tennessee	Knoxville, TN	1
BE&K Construction Co.	Pittsburg, PA	2
Brown & Root Power and Mfg.	Panama City, FL	5
Contractor Services, Inc.	Davenport, IA	5
Dana Corp. and Metaldyne Corp.	St. Mary's, PA and Upper Sandusky, OH	6
Fluor Daniel, Inc.	Greenville, SC	7
Goya Foods of Florida	Miami, FL	8
Hacienda Resort Hotel & Casino	Las Vegas, NV	10
Jones Plastic & Engineering Co.	Camden, TN	11
Laborers Local 210	Buffalo, NY	13

<u>Berthold Nursing Care Center, Inc. d/b/a Oak Park Nursing Care Center</u>	St. Louis, MO	14
<u>Pro-Tec Fire Services Ltd., a subsidiary of JJ Protective Services</u>	Oklahoma, OK	14
<u>Ray Angelini, Inc.</u>	Philadelphia, PA	15
<u>Raymond F. Kravis Center for the Performing Arts</u>	West Palm Beach, FL	17
<u>River Ranch Fresh Foods, LLC</u>	Salinas, CA	18
<u>Ryder Memorial Hospital</u>	Humacao, PR	19
<u>The Painting Co.</u>	Columbus, OH	20
<u>Toering Electric Co.</u>	Muskegon, MI	21
<u>Tribune Publishing Co.</u>	Columbia, MO	24
<u>United States Postal Service</u>	Destin, FL	24
<u>Wal-Mart Stores, Inc.</u>	Wasilla, AK	25

OTHER CONTENTS

<u>List of Decisions of Administrative Law Judges</u>	26
<u>No Answer to Complaint Case</u>	27
<u>List of Test of Certification Cases</u>	27
<u>List of Unpublished Board Decisions and Orders in Representation Cases</u>	28
<ul style="list-style-type: none"> Contested Reports of Regional Directors and Hearing Officers Uncontested Reports of Regional Directors and Hearing Officers Requests for Review of Regional Directors' Decisions and Directions of Elections and Decisions and Orders Miscellaneous Board Decisions and Orders 	

Press Release ([R-2634](#)): NLRB Clarifies Reinstatement Rights of Striking Employees

([R-2635](#)): NLRB Finds that an Employer's Voluntary Recognition of a Union does not bar a Decertification or Rival Union Petition Filed During a 45-Day Period Following Recognition

([R-2636](#)): NLRB Finds the Filing and Maintenance of a Reasonably Based Lawsuit is not Unlawful Regardless of Motive for Bringing Suit

([R-2637](#)): NLRB Modifies Standard in Hiring Discrimination Cases

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Asbestos Workers Local 84 (DST Insulation, Inc.) (8-CB-10424; 351 NLRB No. 3) Bedford, OH Sept. 24, 2007. The Board, adopting the administrative law judge, found that the Respondent did not violate Section 8(b)(3) of the Act by failing to bargain with the Employer. The Board majority of Chairman Battista and Member Liebman found that the Employer adopted by its conduct the terms of a collective-bargaining agreement and, therefore, the Respondent had no duty to bargain over terms of an entirely new contract. The Board majority found that the Employer adopted the contract by engaging in substantial conduct manifesting an intent to be bound, including paying new wage rates under the contract, making fringe benefit contributions, acquiescing to a stipulated judgment in federal court and paying the amounts owed under the agreement, honoring the contractual union-security clause and deducting and remitting union dues, using the Respondent's exclusive hiring hall to secure employees as a union contractor, and corresponding and meeting with the Respondent in a manner consistent with the status of a union contractor. The Board majority found that, under prevailing precedent, this course of conduct was compelling evidence that the Employer had manifested an intent to be contractually bound. [\[HTML\]](#) [\[PDF\]](#)

Member Kirsanow dissented and found that the Respondent violated Section 8(b)(3). Viewing the evidence as a whole, Member Kirsanow found that the Employer did not evince an intent to be bound to the current agreement. In his view, the Employer did not adopt the contract because the Employer's president made statements indicating an intent not to be bound and the Respondent did not claim that the Employer adopted the agreement. In Member Kirsanow's view, the Employer's statements put its subsequent adherence to particular terms of the agreement in a different light and supported a finding that there was no binding contract. Accordingly, Member Kirsanow found that the Respondent breached its duty to bargain by declining the Employer's request to bargain over a new contract.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charge filed by DST Insulation, Inc.; complaint alleged violation of Section 8(b)(3). Hearing at Cleveland on Feb. 14, 2006. Adm. Law Judge Karl H. Buschmann issued his decision May 24, 2006.

Baptist Hospital of East Tennessee (10-CA-33684; 351 NLRB No. 12) Knoxville, TN Sept. 27, 2007. A Board majority of Chairman Battista and Member Schaumber, affirming the administrative law judge, found that the Respondent did not violate Section 8(a)(5) of the Act by unilaterally implementing a change on January 1, 2002, concerning the scheduling of holiday shift work for unit employees assigned to the Respondent's in-patient radiology unit. [\[HTML\]](#) [\[PDF\]](#)

The Board majority determined initially that the General Counsel's theory of the case involved solely a unilateral-change violation, noting that the General Counsel never clearly asserted an alternative Section 8(d) contract-modification theory.

The Respondent had argued that, through the management-rights clause in the parties' collective-bargaining agreement, the Union waived its right to bargain over the scheduling change. The Board majority agreed with the Respondent and the judge that the evidence showed

a clear and unmistakable waiver. They found in particular that the language in the management-rights clause giving the employer the right “to determine and change starting times, quitting times and shifts,” to “assign” employees, and to “change methods and means by which its operations are to be carried on” provided the Respondent with the fundamental right to schedule employees. The Respondent’s unilateral change in scheduling employees for holiday-shift work was consistent with this right. Accordingly, the majority affirmed the judge’s recommended dismissal of the complaint.

In a footnote, Chairman Battista, citing his dissent in *Provena St. Joseph Medical Center*, 350 NLRB No. 64 (2007), stated that his conclusion that dismissal is appropriate would be the same under a “contract coverage” test. Member Schaumber agreed, citing his dissenting position in *California Offset Printers*, 349 NLRB No. 71 (2007).

Member Liebman, dissenting in the present case, would reverse the judge’s dismissal of the complaint. Citing her dissent in *Bath Iron Works Corp.*, 345 NLRB No. 33 (2005), *affd. sub nom. Bath Marine Draftsmen’s Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007), she observed that her “clear and unmistakable waiver” analysis would be the same whether the General Counsel’s theory was “unilateral change” or “contract modification” under Section 8(d). In her view, the management-rights language relied on by her colleagues did not establish a clear and unmistakable waiver, because language in the collective-bargaining agreement separate from the management-rights clause appeared to prohibit the Respondent from making the scheduling change.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Professional Employees Local 2001; complaint alleged violations of Section 8(a)(5) and (1). Hearing held by telephone by agreement of the parties on Jan. 10, 2003. Adm. Law Judge Lawrence W. Cullen issued his decision Feb. 20, 2003.

BE&K Construction Co. (32-CA-9479, et al.; 351 NLRB No. 29) Pittsburg, CA Sept. 29, 2007. The Board, in a 3-2 decision, held that the filing and maintenance of a reasonably based lawsuit does not violate the National Labor Relations Act, regardless of the motive for bringing the suit. [\[HTML\]](#) [\[PDF\]](#)

BE&K filed a lawsuit against several unions in federal district court in California. Ultimately, the suit alleged that the unions were engaged in activities violating both the Act and antitrust laws. The district court granted the unions’ motions for summary judgment and dismissed the employer’s suit. The United States Court of Appeals for the Ninth Circuit affirmed the district court’s decision.

The unions filed unfair labor practice charges alleging that the lawsuit was unlawful because it was retaliatory, and the General Counsel issued a complaint. In an earlier decision in this proceeding, the Board found, pursuant to *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), that the employer's unsuccessful suit violated Section 8(a)(1) because it was filed to retaliate against the exercise of activities protected by the Act. *BE&K Construction Company*, 329 NLRB 717 (1999). The United States Court of Appeals for the Sixth Circuit enforced the Board's decision. *BE&K Construction Co. v. NLRB*, 246 F.3d 619 (2001).

The Supreme Court, however, rejected the Board's analysis on First Amendment grounds. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). The Court first evaluated its relevant precedent concerning the First Amendment's right to petition the government through the courts, most of which had been developed in antitrust cases. The Court found that the threat of an NLRB adjudication amounted to a burden on such petitioning. It also found that the Board's standard for evaluating the lawfulness of completed, unsuccessful lawsuits raised a difficult First Amendment issue. The Court adopted a limiting construction of Section 8(a)(1) to avoid this constitutional issue, and it invalidated the Board's legal standard because it did not comport with that limited construction. The Court remanded the case to the Board for further proceedings consistent with its opinion.

On remand, the Board majority of Chairman Battista and Members Schaumber and Kirsanow noted, first, that in *Bill Johnson's*, the Court had held that, in order to protect the First Amendment right to petition, an *ongoing*, reasonably based lawsuit could not be enjoined as an unfair labor practice even if its motive was to retaliate against the exercise of rights protected by the Act. In light of the Court's opinion in *BE&K*, the Board then found:

These principles, in our view, are equally applicable to both *completed* and ongoing lawsuits. ...

[The] chilling effect on the right to petition exists whether the Board burdens a lawsuit in its initial phase or after its conclusion. Indeed, the very prospect of liability may deter prospective plaintiffs from filing legitimate claims. Thus, the same weighty First Amendment considerations catalogued by the Court in *Bill Johnson's* with respect to ongoing lawsuits apply with equal force to completed lawsuits. In sum, we see no logical basis for finding that an ongoing, reasonably based lawsuit is protected by the First Amendment right to petition, but that the same lawsuit, once completed, loses that protection solely because the plaintiff failed to ultimately prevail. Nothing in the Constitution restricts the right to petition to winning litigants.

... Accordingly, we find that, just as with an ongoing lawsuit, a completed lawsuit that is reasonably based cannot be found to be an unfair labor practice. In determining whether a lawsuit is reasonably based, we will apply the same test as

that articulated by the Court in the antitrust context: a lawsuit lacks a reasonable basis, or is “objectively baseless,” if “no reasonable litigant could realistically expect success on the merits.” *Professional Real Estate Investors*, 508 U.S. at 60.

In applying its new standard to the facts of the case, the Board found that it was bound by the Court’s view that the employer’s lawsuit was reasonably based, but it reached the same conclusion based on its own analysis of the suit. Although the suit ultimately was unsuccessful, it was not shown to lack a reasonable basis. Accordingly, the Board dismissed the complaint without evaluating the employer’s motive for filing the suit.

In dissent, Members Liebman and Walsh disagreed with the breadth of the majority’s decision. In their view, the Supreme Court did not hold that all reasonably based suits are constitutionally immune from liability under the Act, and the majority went too far in protecting First Amendment interests at the expense of rights protected by the Act. The dissent stated:

What the *BE & K* decision leaves open is convincingly described by the concurring opinion of Justice Breyer in *BE & K*, which was joined by Justices Stevens, Souter, and Ginsburg: The Board may *not* “rest its finding of ‘retaliatory motive’ almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union.” 536 U.S. at 539. Left open, in contrast, is the possibility of imposing unfair labor practice liability in “other circumstances in which the evidence of ‘retaliation’ or antiunion motive might be stronger or different.” *Id.*

One example, as Justice Breyer’s concurrence observes, is the situation expressly referred to by the Court’s opinion: a case involving “an employer, indifferent to outcome, who intends the reasonably based but unsuccessful lawsuit simply to impose litigation costs on the union.” *Id.* A second example is the lawsuit brought by an employer “as part of a broader course of conduct aimed at harming the unions and interfering with employees’ exercise of their rights under” the Act. *Id.*

In the dissent’s view, *Bill Johnson’s* requires the Board to balance the need to protect Section 7 rights from incursion by lawsuits against the need to safeguard the constitutional right of access to the courts. Although the *BE&K* Court, distanced itself from *Bill Johnson’s*, the dissent asserts that it did not reject this balancing principle, or preclude the Board from imposing a measured burden on the right to petition in order to protect rights under the Act.

The dissent would have remanded the case for further litigation to evaluate whether the employer’s suit was retaliatory because it was brought to impose litigation costs on the unions or as part of a broader pattern of conduct unlawful under the Act.

(Full Board participated.)

Brown & Root Power and Mfg., Inc., A Subsidiary of Brown and Root, Inc. (15-CA-12752, 12875; 351 NLRB No. 20) Panama City, FL Sept. 28, 2007. The Board, adopting the administrative law judge in part, found unanimously that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to hire, and to consider for hire, applicants at a jobsite who had an intent to organize. The Board found that the Respondent had plans to hire at the jobsite, that the applicants had experience or training relevant to the positions to be filled, and that antiunion animus contributed to the decision not to hire and consider for hire. Accordingly, the Board found that the General Counsel had met its burden under *FES*, 331 NLRB No. 9 (2000).

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Although the Board held that the Respondent demonstrated it had a preferential hiring system based on applicants' status as former employees and referral from supervisors and the on-site project operator, the Board found that the Respondent did not show that it maintained an additional preference category pertaining to "gate hires." The Board held that instatement was appropriate for openings within each of the Respondent's hiring classifications that were discriminatorily filled by nonpreference hires.

Additionally, the Board found that the Respondent was aware that certain individual applicants had an active union involvement and organizational intent, but found that the applications of certain other applicants did not show an active intent to organize or present union affiliation.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Adm. Law Judge J. Pargen Robertson issued his supplemental decision May 10, 2001.

Contractor Services, Inc. (10-CA-28856 et al.; 351 NLRB No. 4) Davenport, IA Sept. 27, 2007. Chairman Battista and Members Schaumber and Kirsanow found, contrary to the administrative law judge, that backpay claimant Tracy Landers, a paid union organizer, was not entitled to any backpay. The backpay claim of discriminatee William Hunt was remanded to the judge for further consideration in light of the Board's decision in *Oil Capitol Sheet Metal*, 349 NLRB No. 118 (2007). [\[HTML\]](#) [\[PDF\]](#)

In a 1997 decision subsequently enforced by the 11th Circuit, the Board held that the Respondent discriminatorily denied employment to Landers and Hunt following their submission of applications for work in 1995. *Contractor Services*, 324 NLRB 1254 (1997), *enfd.* *Contractor Services v. NLRB*, No. 00-10668 (11th Cir. 2000). Thereafter, a compliance proceeding was held to determine their entitlement to backpay.

Hunt, a volunteer union organizer, was a salt. Pursuant to *Oil Capitol Sheet Metal*, the General Counsel therefore had the burden of proving the duration of his backpay period. The Board remanded the case to the judge for further proceedings on that issue.

Landers, a paid union organizer, also was a salt. The Board did not remand his backpay claim, however, because he was entitled to no backpay under established law. First, the Board held that the General Counsel failed to show that his backpay calculations for Landers were reasonable and not arbitrary. Those calculations assumed that he would have accepted referrals to any location even those that required significant travel, despite substantial evidence that he would not have accepted referrals to locations outside of the union's geographic jurisdiction because such work would have interfered with his responsibilities to the union. Second, the Board held that he failed to mitigate his damages by making an honest, good faith effort to find interim work. He limited his search to nonunion employers, and did not seek employment on many short duration jobs, or jobs outside the union's geographic jurisdiction, because they did not offer substantial organizing opportunities. Moreover, he failed to expand his search when his initial efforts were unsuccessful and only applied to 23 employers during the 46-month backpay period. Taken as a whole, the Board found these haphazard efforts insufficient especially when contrasted with the success in obtaining employment of Hunt and another discriminatee, who did not similarly limit their search efforts.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Hearing at Atlanta, GA, Dec. 3 and 4, 2001. Adm. Law Judge Lawrence W. Cullen issued his decision April 24, 2002.

Dana Corp. and Metaldyne Corp. (6-RD-1518, 1519 and 8-RD-1976; 351 NLRB No. 28) St. Mary's, PA and Upper Sandusky, OH Sept. 29, 2007. The Board, in a 3-2 decision, modified its recognition-bar doctrine, and held that an employer's voluntary recognition of a labor organization does not bar a decertification or rival union petition that is filed within 45 days of the notice of recognition. [\[HTML\]](#) [\[PDF\]](#)

In deciding this case the Board considered the positions of the parties and amicus submissions from various companies, organizations, and individuals, as well as Members of the U.S. Senate and U.S. House of Representatives.

Under its former policy, established in *Keller Plastics Eastern, Inc.*, 157 NLRB 583 (1966), an employer's voluntary recognition of a union, based on a showing of the union's majority status, barred a decertification petition filed by employees or a rival union's petition for a reasonable period of time. The Board had reasoned that labor-relations stability was promoted by a rule under which a voluntarily recognized union was insulated from challenge to its status while negotiating for a first collective-bargaining agreement.

In *Dana*, the Board majority of Chairman Battista and Members Schaumber and Kirsanow concluded that although the basic justifications for providing an insulated period are sound, they do not warrant *immediate* imposition of an election bar following voluntary recognition. The Board held that the uncertainty surrounding voluntary recognition based on an

authorization card majority, as opposed to union certification after a Board election, justifies delaying the election bar for a brief period during which unit employees can decide whether they prefer a Board-conducted election. Under the Board's new policy, an employee or rival union may file a petition during a 45-day period following notice that a union has been voluntarily recognized. The petition will be processed if, like other petitions, it is supported by 30 percent of the bargaining unit. The Board will apply this modified procedure prospectively only.

In dissent, Members Liebman and Walsh stated that nothing in the majority's decision justifies its radical departure from the longstanding and judicially approved procedure first announced in *Keller Plastics*. The dissent maintains that voluntary recognition is a favored element of national labor policy, yet the majority relegates it to disfavored status by allowing a minority of employees, the number needed to file a decertification petition, to disrupt the bargaining process just as it is getting started. This, the dissent contends, will discourage voluntary recognition altogether.

(Full Board participated.)

Fluor Daniel, Inc. (26-CA-13842; 351 NLRB No. 14) Greenville, SC Sept. 28, 2007. This case involved compliance proceedings concerning the portion of the Board's original decision in 311 NLRB 498 (1993) that the United States Court of Appeals for the Sixth Circuit had upheld in 161 F.3d 953 (6th Cir. 1998). (The court had remanded a separate portion of the case for further findings; the Board resolved exceptions to that portion of the case in *Fluor Daniel, Inc.*, 350 NLRB No. 66 (2007).) The compliance proceedings involved one discharged employee (employee Bolen) and two union salt-applicants (the Coons brothers) whom the Respondent had discriminatorily refused to hire. [\[HTML\]](#) [\[PDF\]](#)

With respect to employee Bolen, a Board majority (Members Schaumber and Kirsanow) assumed, without deciding, that the presumption of continued employment set forth in *Dean General Contractors*, 285 NLRB 573 (1987), did not apply, but found that the General Counsel nevertheless provided sufficient affirmative evidence that Bolen would have been employed throughout the backpay period because Bolen would have been subject to the Respondent's preference for hiring former employees and because Bolen worked continuously throughout the backpay period. The Board also rejected the Respondent's claim that Bolen was obligated to, but failed, to reapply, and found that the Respondent failed to demonstrate that it lacked available positions that were substantially equivalent to Bolen's former position. In addition, the Board rejected the Respondent's claim that the judge erred by allowing the General Counsel to exclude lower-level "helper" positions in calculating Bolen's backpay, noting the compliance officer's testimony that Bolen would not have accepted such a position. The Board also affirmed the judge's approval of the General Counsel's use, in calculating gross backpay, of the top 10 percent of employees in terms of number of hours worked in each individual year of the backpay period, because Bolen had been consistently employed, and the Respondent had jobs available for which Bolen was qualified, throughout that entire period. The Board rejected, as

unsupported by pertinent evidence, the Respondent's claim that a "seasonal" variation should have applied in calculating Bolen's backpay. Finally, a Board majority (Members Liebman and Kirsanow) found that the judge did not err by beginning Bolen's backpay period on May 3, 1990, as that had been the date on which the initial judge's decision had found that Bolen had been "effectively discharged," the Board and the court had not disturbed that holding, and the Respondent had not established facts that would have warranted altering the date.

With respect to the Coons brothers, the majority (Members Schaumber and Kirsanow) remanded the portion of the case concerning them for further findings in light of the Board's decision in *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007). In doing so, the majority noted that on remand, the judge would be foreclosed from revisiting the Board's previous order of instatement, as the Order had been enforced by the court. However, the majority found that the judge would not be precluded from applying *Oil Capitol* in determining the duration of the backpay periods.

Member Liebman dissented in part, stating that she would find that the law of the case required the application of *Dean General* to Bolen and the Coons brothers.

Member Schaumber also dissented in part, stating that the record did not support beginning Bolen's backpay period on May 3, as Bolen had indicated that he would not return to work until picketing ended, and the court had assumed that picketing had continued beyond that date.

(Members Liebman, Schaumber, and Kirsanow participated.)

Goya Foods of Florida (12-CA-21464, et al.; 351 NLRB No. 13) Miami, FL Sept. 28, 2007. In the third of recent decisions involving the same parties, the Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing bargaining unit drivers' routes, wages, and hours when implementing a new Roadnet software routing program. The Board reversed the judge to find that the Respondent also violated Section 8(a)(5) and (1) by unilaterally implementing a new inspection procedure for drivers returning to the Respondent's warehouse with goods refused by customers, and by unilaterally reassigning stores on the delivery route of a discharged driver to other drivers. [\[HTML\]](#) [\[PDF\]](#)

The Respondent contended that all changes took place after it lawfully withdrew recognition from the Union as the previously certified bargaining representative of employees in two bargaining units. However, in *Goya Foods of Florida*, 347 NLRB No. 103 (2006) (*Goya I*), the Board found that the withdrawal of recognition was unlawful and ordered the Respondent to recognize and bargain with the Union as the continuing majority representative of unit employees. The Board relied on *Goya I* in rejecting the Respondent's argument in the present case that it had no general statutory obligation to bargain.

The Respondent also contended that it had no obligation to bargain about changes in route and store assignments because such changes were consistent with an alleged past practice of maintaining a dynamic status quo in which the stores assigned to sales employees and drivers varied daily. The Board rejected the same argument in *Goya I*, finding that the Respondent relied on “an historic right to act unilaterally, as distinct from an established practice of doing so [T]hat right to exercise sole discretion changed once the Union became the certified representative.” 347 NLRB No. 103, slip op. at 3. The Board relied on this rationale in finding similar unilateral change violations in *Goya Foods of Florida*, 350 NLRB No. 74 (2007) (*Goya II*) and did so again in the present case in finding that changes in routes, wages, and hours resulting from implementation of the Roadnet program and the reassignment of stores on a discharged driver’s route violated Section 8(a)(5). Reversing the judge in finding the latter violation, the Board stated that the judge mischaracterized the issue as involving an employer’s right to take action as a temporary expedient to meet the next day’s delivery demands. Instead, the Board found that the issue involved the permanent or long-term reassignment of stores on the discharged driver’s route and, as in similar reassignment situations litigated in *Goya I*, the Respondent failed to meet its obligation to bargain before making those changes.

In reversing the judge’s recommended dismissal of the allegation that the Respondent’s implementation of a new inspection procedure for refused goods, the Board disagreed with the judge that the change had a de minimus effect on bargaining unit drivers. The Board emphasized that the Respondent’s new requirement that drivers sign to verify the accuracy of the refused goods inspection formalized drivers’ responsibility and created the potential of discipline for failing to follow the new procedure. As such, the change was substantial and material, triggering the Respondent’s obligation to bargain with the Union prior to imposing the new inspection procedure.

The Board ordered the Respondent to rescind the unlawfully implemented inspection procedure. In light of the fact that the decision to implement the new Roadnet program companywide preceded the Union’s certification, the Board agreed with the judge that the Respondent should not be ordered to rescind its use of that program, although the Respondent will have to bargain about its effects on bargaining unit drivers. However, the Board disagreed with the judge that no remedial backpay remedy was warranted for the Roadnet violation. It ordered the Respondent to make whole the drivers for any losses resulting from the implementation of Roadnet.

As in *Goya II*, the Board rejected the Respondent’s contentions the General Counsel engaged in impermissible relitigation or piecemeal litigation of various allegations in this proceeding and that the judge erred by issuing a decision before the Board issued its decision in *Goya I*.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by UNITE HERE; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Miami, Nov. 8, 9, and 13, 2001. Adm. Law Judge Raymond P. Green issued his decision July 2, 2004.

Hacienda Hotel, Inc. Gaming Corp., d/b/a Hacienda Resort Hotel & Casino (28-CA-13274, 13275; 351 NLRB No. 32) Las Vegas, NV Sept. 29, 2007. The Board accepted the remand of the U.S. Court of Appeals for the Ninth Circuit (*Local Joint Executive Board of Las Vegas, Culinary Workers Union Local 226 v. NLRB*, 309 F.3d 578 (9th Cir. 2002)), as the law of the case in concluding that the Respondents did not violate Section 8(a)(5) and (1) of the Act by unilaterally ceasing dues checkoff after the parties' collective-bargaining agreements expired. The Board based its finding on the particular circumstances of this case, in which the dues-checkoff clauses in the parties' collective-bargaining agreements contained explicit language limiting the Respondents' dues-checkoff obligation to the duration of the agreements. [\[HTML\]](#) [\[PDF\]](#)

In its initial decision, 331 NLRB 665, issued on July 7, 2000, the Board affirmed the administrative law judge's decision that the Respondents had not violated the Act by unilaterally ceasing dues checkoff. The judge reasoned that the dues-checkoff provisions contained explicit language, which limited the Respondents' dues-checkoff obligation to the duration of the agreements. The Board, however, relied on a different rationale based on "well-established precedent that an employer's obligation to continue a dues-checkoff arrangement expires with the contract that created the obligation," citing *Bethlehem Steel Co.*, 136 NLRB 1500, 1502 (1962), remanded on other grounds sub nom. *Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615 (3d Cir. 1963), cert. denied 375 U.S. 984 (1964), and its progeny.

In vacating the Board's earlier Decision and Order, the court concluded that it was "unable to discern the Board's rationale for excluding dues-checkoff from the unilateral change doctrine in the absence of union security," and, therefore, the court did "not reach the question whether such a rule would be 'rational and consistent' with the Act and therefore entitled to deference." Therefore, the court remanded the case to the Board with instructions to articulate a reasoned explanation for its decision, whether the Board decides to reaffirm its earlier decision or adopt a different rule.

Chairman Battista concurred in the Board's newly articulated rationale, agreeing with his colleagues and the judge that the language of the dues checkoff clause specifically made clear that its duration was coterminous with that of the collective-bargaining agreement. He noted his view that this rationale is further supported by the alternate rationale in the Third's Circuit's opinion enforcing the Board's decision in *Bethlehem Steel Co.*, supra. Chairman Battista wrote separately to convey his view that even if the parties, unlike here, fail to express this intention in their collective-bargaining agreement, he would include dues checkoff among the class of mandatory subjects that are excluded from the unilateral change doctrine under *Katz*, i.e., which do not survive contract expiration. He reasoned that dues checkoff is a form of economic

weaponry, albeit milder than a lockout, whereby the Respondent cuts off the automatic flow of funds in order to persuade the Union to agree with the Respondent on outstanding contract issues.

Members Liebman and Walsh dissented, rejecting the majority's position for the reasons stated in the original dissent. They found that as a general matter, dues check-off survives contract expiration, and the Respondent violated Section 8(a)(5) and (1) by unilaterally ceasing to honor employees' dues-checkoff authorizations following expiration of the collective-bargaining agreements, notwithstanding the contract language relied on by the majority. The dissent rejected the majority's approach, stating that it "would effectively drain the *Katz* doctrine of any force." The dissent also rejected Chairman Battista's economic weapon theory, stating that "rather than justifying a principled exception to *Katz*, his logic would vitiate the policy altogether." Chairman Battista countered the dissent, stating "That fear is unfounded. The rationale of *Indiana & Michigan Electric*, on which I rely to exclude dues checkoff from the *Katz* doctrine, would be applicable to very few other terms and conditions of employment."

(Full Board participated.)

Jones Plastic & Engineering Co. (26-CA-20861; 351 NLRB No. 11) Camden, TN Sept. 27, 2007. The Board announced that at-will employment status does not detract from an employer's otherwise valid showing that it has permanently replaced striking employees. The Board overruled *Target Rock*, 324 NLRB 373, 374 (1997), *enfd.* 172 F.3d 921 (D.C. Cir. 1998), to the extent it is inconsistent with that principle. [\[HTML\]](#) [\[PDF\]](#)

An economic striker who unconditionally offers to return to work is entitled to immediate reinstatement unless the employer has hired a permanent replacement for the striker in order to continue its business operations during the strike. *Mackay Radio & Telegraph Co. v. NLRB*, 304 U.S. 333, 345-346 (1938). Thus, at the conclusion of a strike, an employer is not bound to discharge those hired permanently to fill the places of economic strikers, but permanent replacement status is an affirmative defense, with the burden on the employer to show a mutual understanding with the replacements that they are permanent.

Many employers hire employees on an "at-will" basis, meaning that they can be discharged at any time, with or without cause. In *Target Rock*, the Board opined that statements advising replacement employees of their at-will status "obviously do not support the [r]espondent's position that the striker replacements were permanent." In *Jones Plastic*, the General Counsel asserted that because *Target Rock* could be read to deprive at-will replacement employees of permanent status, the law should be changed to make clear that at-will employment does not foreclose a finding of permanent replacement status.

A Board majority (Chairman Battista and Members Schaumber and Kirsanow) concluded that at-will employment status does not detract from permanent replacement status, stating that

we view as untenable any implication in *Target Rock* that conditions on hiring other than those enumerated in *Belknap* detract from a finding of permanent replacement status. Instead, we find that the status of the replacements hired by the Respondent in this case is indistinguishable from the status of probationary employees found to be permanent replacements in *Kansas Milling*, [97 NLRB 219, 225-226 (1951)], and its progeny. In those cases, the probationary employees were subject to discharge without cause, and their post-probation employment was subject to their satisfaction of the employer's standards. As a matter of law, then, equivalent conditions imposed by the Respondent through its at-will disclaimers do not detract from other evidence proving the replacements' status as "permanent employees" for the purpose of federal labor law.

Applying those principles, the Board found that the Respondent's issuance of at-will disclaimers informing employees that their employment was for "no definite period" and could be terminated for "any reason" and "at any time, with or without cause" did not detract from its showing of permanent replacement status. In reaching this conclusion, the Board noted that the Respondent was following its normal employment practices because the strikers as well as the replacements were employed on an at-will basis.

The Board found that the other evidence in the case supported a finding of permanent replacement status. The Respondent issued to the replacement employees forms stating that they were permanent replacements, in many cases naming the striker whom the individual was hired to permanently replace. The Respondent also told striking employees that it had begun to hire permanent replacements and that they risked permanent replacement if they did not return to work. The Respondent's human resource manager also told one replacement that he was a permanent employee. On these facts, the Board concluded that the Respondent established a mutual understanding with its replacement employees that they would not be displaced by returning strikers at the end of the strike, which is the meaning of "permanence" in this context.

Members Liebman and Walsh dissented. In their view, Board precedent established that at-will employment was *not* incompatible with permanent replacement status, and nothing in *Target Rock* required the overruling of that case. What is required to show permanent status, in their view, is "the promise to the replacements of some right vis-à-vis the strikers" – "'strikers . . . are entitled to reinstatement' unless the employer has made a commitment to the replacements that would be breached if the employer 'discharg[ed] them to make way for selected strikers . . .'" [Belknap, *supra*, 463 U.S. at 503-504]."

The dissent noted that the Respondent had advised the replacements that their employment “may be terminated as a result of a strike settlement agreement . . . or by order the National Labor Relations Board” and stated that

[h]ad the Respondent made only the latter statement, a finding that the replacements were permanent would follow. But the Respondent did not so limit itself. Rather, it told the employees not only that they could be displaced as a result of a strike settlement or Board order, but, *additionally*, that they could be discharged at any time for any reason. Taken together - and absent any other evidence of mutual understanding of permanence - the Respondent’s statements did not reflect any commitment by the Respondent to the replacements. Certainly, the statements did not reflect a commitment that the Respondent would refuse, in the absence of a strike settlement, to reinstate strikers if it meant terminating replacements. Although the Respondent used the term “permanent replacement,” it then undercut that statement by failing to give the replacements any assurance that they had rights vis-à-vis the strikers.

Because the dissent concluded that a mutual understanding of permanent employment was not established, in their view the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate the strikers upon their unconditional offer to return to work.

(Full Board participated.)

Charge filed by the Steelworkers; complaint alleged violation of Section 8(a)(1) and (3). Parties waived their right to a hearing before an administrative law judge.

Laborers Local 210 (Surianello General Contractor) (3-CD-645; 351 NLRB No. 25) Buffalo, NY Sept. 28, 2007. The Board found that employees of Surianello General Concrete Contractor, Inc. represented by Laborers Local 210, rather than those represented by Operating Engineers Local 17, are entitled to operate the EZ Gang Drill at the Employer’s jobsite located on Interstate 90 in Blasdell, New York. In finding that there was reasonable cause to believe that Section 8(b)(4)(D) had been violated, the Board rejected Local 17’s claims that: (1) it did not assert a claim to the disputed work; (2) Local 210’s threat of job action was a sham; (3) the dispute is not appropriate for a Section 10(k) hearing because Local 210 merely asserts a work preservation claim; and (4) an agreed-upon method of voluntary resolution exists. On the merits of the dispute, the Board awarded the disputed work to the Laborers-represented employees based on the factors of collective-bargaining agreements, employer preference, current assignment and past practice, area practice, relative skills and training, and economy and efficiency of operations. [\[HTML\]](#) [\[PDF\]](#)

(Members Schaumber, Kirsanow, and Walsh participated.)

Berthold Nursing Care Center, Inc. d/b/a Oak Park Nursing Care Center (14-RC-12485; 351 NLRB No. 9) St. Louis, MO Sept. 26, 2007. The Board majority (Chairman Battista and Member Kirsanow) reversed the Regional Director's finding that the petitioned-for licensed practical nurses (LPNs) at the Employer's long-term care facility were not statutory supervisors under the Act. The majority found that the LPNs were supervisors by virtue of their authority to discipline, and effectively recommend discipline of, employees. In so finding, the majority relied on the fact that the LPNs have the authority to fill out employee counseling forms under the Employer's progressive disciplinary policy, which lay a foundation for future discipline against an employee. Additionally, the majority found that the LPNs have the authority to effectively recommend discipline against employees; recommendations which are accepted without further independent investigation. Accordingly, the majority dismissed the petition. [\[HTML\]](#) [\[PDF\]](#)

In his dissent, Member Walsh notes that he would have affirmed the Regional Director as the authority to fill out counseling forms, without more, does not constitute supervisory authority to discipline. In this respect, Member Walsh noted that every counseling form that is filled out by an LPN is reviewed by higher management; the forms do not contain disciplinary recommendations; and any resulting discipline is not automatic, but rather a result of upper management's exercising independent judgment. Moreover, Member Walsh found that the LPNs do not have the authority to effectively recommend discipline either.

(Chairman Battista and Members Kirsanow and Walsh participated.)

Pro-Tec Fire Services Ltd., a subsidiary of JJ Protective Services (17-CA-21310, 21486; 351 NLRB No. 8) Oklahoma City, OK Sept. 27, 2007. In this case, the Board adopted the administrative law judge's finding that the Respondent violated Section 8(a)(1) of the Act by banning all union activities at the workplace and by disparately restricting the personal use of company vehicles to nonunion business. [\[HTML\]](#) [\[PDF\]](#)

The Board (Chairman Battista and Member Schaumber; Member Liebman, dissenting) reversed the judge's finding that the Respondent violated Section 8(a)(3) of by refusing to consider for hire employee Robert Manley. The majority found no evidence that the selecting officials Rynerson and Cashman independently bore animus at all toward Manley for his prior union activity. Member Liebman would find sufficient circumstantial evidence to establish by a preponderance of the evidence that the Respondent's refusal to hire Manley was motivated by antiunion animus toward Manley's union activity.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Firefighters Local 3694; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Oklahoma City on June 18, 2002. Adm. Law Judge Lana Parke issued her decision Aug. 1, 2002.

Ray Angelini, Inc. (4-CA-24904; 351 NLRB No. 24) Philadelphia, PA Sept. 28, 2007. The Board in this supplemental decision and order found that the Respondent's lawsuit was reasonably based, and therefore under the test set forth in the Board's supplemental decision in *BE&K*, 351 NLRB No. 29 (2007), the filing and maintenance of the lawsuit did not violate the Act. The Board dismissed the complaint. [\[HTML\]](#) [\[PDF\]](#)

The lawsuit arose out of the City of Philadelphia's (City) bid process for electrical work at the Philadelphia International Airport (Airport). The City notified the Respondent that it was the lowest bidder. However, the Charging Party Union (Union) notified the City that the Respondent had violated prevailing-wage regulations on jobs it performed for the State of New Jersey. The City made inquiries and then notified the Respondent that it was disqualified from receiving the Airport contract. The Respondent requested a disqualification hearing but the Respondent's disqualification was upheld and the City awarded the Airport contract to another company. The Respondent filed suit in state court against the City and the other company. The Respondent also made inquiries and, as a result, informed the City that it awarded contracts to other bidders with much more serious prevailing-wage violations than those alleged to have been committed by the Respondent. Also, the Respondent's attorney encountered the City's Director of Procurement who stated that the City's political obligations to the Union's business agent were involved in the Airport contract. The Union had a convention coming to the City and it would not look good if a non-union contractor, such as the Respondent, was working on the Airport contract. Thereafter, the Respondent dropped its state court action and filed suit in federal district court—the lawsuit at issue in this case—against the City, the company awarded the Airport contract, and the Union. The Respondent alleged that the defendants had acted in concert, under color of state law, to deprive the Respondent of its 14th Amendment right to substantive due process. The Respondent alleged that the defendants conspired to have the Respondent, a non-union contractor, disqualified from the Airport contract and divested of its bid in favor of a union contractor. The Respondent relied heavily on its attorney's conversation with the City's Director of Procurement and the Respondent's information about the City awarding contracts to other bidders with much more serious prevailing-wage violations than those alleged to have been committed by the Respondent.

The Union filed a motion to dismiss the complaint for failure to state a claim on which relief may be granted. The court denied this motion, without opinion, and also denied a similar motion filed by other defendants. The Union next filed a motion for summary judgment which the court denied, again without opinion. The court then conducted a five-day bench trial after which the court dismissed the Respondent's complaint in its entirety, with prejudice. The Respondent failed to prove the existence of a conspiracy between the Union and the City. The court required the Respondent to pay the cost of the proceeding, but it denied the Union's request for attorneys' fees. The Respondent did not appeal the court's decision.

Meanwhile the Union filed a charge alleging that the Respondent's lawsuit was filed in retaliation against the Union's exercise of Section 7 rights and thus violated Section 8(a)(1). The Board's administrative law judge found the violation. She applied *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) and reasoned that because the Respondent's lawsuit

was “unsuccessful,” it was unlawful if filed in retaliation against the exercise of Section 7 rights. The administrative law judge so found citing the Respondent’s opposition to the Union’s having reported its prevailing-wage violations to City officials, to the Union’s lobbying those officials in an effort to obtain City contracts for union contractors, and to the Union’s business agent’s efforts to ingratiate himself with potential voters. The Board adopted the administrative law judge’s decision.

The General Counsel and the Respondent urged the Board to dismiss the complaint in light of the Supreme Court’s decision in *BE&K Construction Company v. NLRB*, 536 U.S. 516 (2002). They argued that the lawsuit had a reasonable basis and did not violate the Act. The Union urged the Board to find the violation because it was not objectively reasonable given the Union’s evidence.

In this supplemental decision, the Board cited its recent *BE&K* decision for the principle that: “the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or completed, and regardless of the motive for initiating the lawsuit.” The Board also cited the Supreme Court’s decisions in *Professional Real Estate Investors, Inc. v. Columbia Picture Industries*, 508 U.S. 49 (1993) and *Bill Johnson’s Restaurants*, supra. The former provides that “a lawsuit lacks a reasonable basis, or is ‘objectively baseless,’ if ‘no reasonable litigant could reasonably expect success on the merits.’” The latter provides that: “if there is a genuine issue of material fact that turns on the credibility of witnesses or on the proper inferences to be drawn from undisputed facts, it cannot, in our view, be concluded that the suit should be enjoined,” and that the Board should “stay its hand” unless “the plaintiff’s position is plainly foreclosed as a matter of law or is otherwise frivolous.”

The Board applied these principles here and found that the Respondent’s lawsuit was reasonably based. The Board noted that the district court’s denial of the Union’s motions to dismiss and for summary judgment allowed the Board to infer, first, that the Respondent’s complaint stated a claim upon which relief could be granted, and second, that disputed issues of material fact existed precluding judgment as a matter of law in the Union’s favor. Thus, the Board could not say that the Respondent could not have reasonably expected to succeed on the merits. Indeed, the Board noted that the Union wanted the Board to readjudicate its motion for summary judgment, i.e. to have the Board find no factual dispute as to the existence of a conspiracy. However, the court found to the contrary. The Board declined the Union’s invitation to second-guess the court in this regard. The Board found the Respondent’s lawsuit was reasonably based and dismissed the complaint.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Raymond F. Kravis Center for the Performing Arts (12-CA-21361; 351 NLRB No. 19) West Palm Beach, FL Sept. 28, 2007. In a 3-0 decision, the Board modified its standard for determining under what circumstances a union merger or affiliation may relieve an employer of its obligation to recognize and bargain with an incumbent union. Reversing precedent, the Board determined that an employer could not withdraw recognition after a merger or affiliation merely because the merger or affiliation was not conducted with adequate “due process.” Rather, the Board held that the employer’s obligation to recognize the union continues unless the merger or affiliation resulted in changes so significant as to alter the identity of the bargaining representative. [\[HTML\]](#) [\[PDF\]](#)

The Board affirmed the administrative law judge’s finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally withdrawing recognition from the International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States, its Territories and Canada, Local 623 (Local 623) on September 11, 2000. On February 1, 2002, shortly before the hearing in this case began, Local 623 merged with five other locals to form Local 500. Applying existing Board law, the judge rejected the General Counsel’s contention that Local 500 was the successor to Local 623, finding that the merger had occurred without due process because union members had not been provided the opportunity to vote on the merger. Accordingly, the judge found that the Respondent had no obligation to recognize and bargain with Local 500, and that any bargaining obligation the Respondent had with Local 623 terminated as of the date of the merger.

Having determined that the due process requirement was no longer viable in light of the Supreme Court’s decision in *N.L.R.B. v. Financial Institution Employees of America Local 1182 (Seattle-First)*, 475 U.S. 192 (1986), the Board examined whether the merger resulted in such a dramatic change to the Union as to alter its identity as the bargaining representative of the Respondent’s employees. Because the Board found no such change had occurred, it reversed the judge and found that the Respondent’s obligation to recognize and bargain with the Union continued after the merger.

The Board affirmed the judge’s finding that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment, including eliminating department head positions and refusing to use the Union’s hiring hall, without complying with the requirements of Section 8(d)(3) and without having first lawfully bargained to impasse with respect to those terms and conditions. The Board also affirmed the judge’s finding that the Respondent violated Section 8(a)(5) and (1) by declaring impasse over a change in the scope of the bargaining unit.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charge filed by Theatrical Stage Employees Local 623; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Miami on various dates between Feb. 4 and Aug. 7, 2002. Adm. Law Judge Raymond P. Green issued his decision Sept. 28, 2007.

River Ranch Fresh Foods, LLC (32-CA-19938; 351 NLRB No.15) Salinas, CA Sept. 28, 2007. The Board (Members Schaumber and Kirsanow; Member Liebman dissenting) reversed the administrative law judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Eduardo Moran because of his union activities. [\[HTML\]](#) [\[PDF\]](#)

In June 2002, the Respondent purchased the predecessor's business, hiring all of the employees subject to a 90-day probationary period. On August 9, the Respondent and the Union concluded negotiations for a successor collective-bargaining agreement, retroactive to July 1, which restored the prior 60-day probationary period. During the probationary period, an employee could be terminated for any nondiscriminatory reason. Moran, a mechanic in the maintenance department, and two other maintenance employees were discharged by the Respondent about 2 weeks before the end of the shortened probationary period. The judge dismissed allegations that the Respondent unlawfully discharged the other two maintenance employees.

The judge, however, found that the Respondent violated Section 8(a)(3) by firing Moran. The judge found that the General Counsel satisfied his initial *Wright Line* burden of proving that the discharge was unlawfully motivated. The judge also found the timing of Moran's discharge suspect because it occurred "within weeks" of his union activity. The judge rejected the Respondent's defense that Moran was discharged during the probationary period because of his poor work performance. The judge concluded that the Respondent's witnesses' stated reasons for discharging Moran were inconsistent and, therefore, pretextual. The judge found the true reason was that Moran "talked to the Union and to employees about the Union."

In reversing the judge, the Board assumed that the General Counsel met his initial burden but found that the Respondent's reasons were not pretextual. The judge based his conclusion that the reasons were pretextual on his explicit findings that Carolyn Humphreys, Respondent's vice president of human resources, testified that "talking too much" was the only reason for the discharge and that her testimony was inconsistent with the reasons given by Maintenance Manager Gary Elk. The Board found that Humphreys did not in fact testify that "talking too much" was the only reason Elk gave her. Rather Elk's reason was that, because of Moran's excessive talking, Moran was "not getting the work done." Elk's testimony about his conversation with Humphreys was substantially the same. The judge also took out of context, or otherwise distorted, portions of the Elk's testimony. Rather, viewed in context, the Board found that the consistent reason given by the Respondent's witnesses for discharging Moran was that he was not performing his work. Thus, the Respondent's reason was not pretextual.

The Respondent also satisfied its rebuttal burden that it would have discharged Moran even in the absence of his union activity. The judge did not discredit Elk's testimony that Moran was not performing his work and no evidence was introduced contradicting Elk's assessment of Moran's performance. Neither did any evidence show Moran's discharge to be disparate. The Board noted that the Respondent could discharge a probationary employee for any nondiscriminatory reason. Further, any inference of suspicious timing was undermined by the approaching end of the probationary period, which influenced the timing of Moran's discharge as

well as that of other employees. Contrary to their dissenting colleague's view, the Board held that regardless of what Moran was talking about, the Respondent could, nevertheless, legitimately discharge him for his resulting failure to perform his work.

In dissent, Member Liebman would adopt the judge's conclusion that the Respondent unlawfully discharged Moran. She agreed with the judge that the General Counsel met his initial *Wright Line* burden. She would further find that the Respondent did not show that it would have discharged Moran even in the absence of his union activity because Moran's protected union speech is inextricably intertwined with the Respondent's reason for discharging Moran. Member Liebman also disagreed that the upcoming end of the probationary period undermines other evidence of illegal motive.

No exceptions were filed to the judge's findings that the Respondent committed five Section 8(a)(1) violations. The Board, therefore, found it unnecessary to pass on the findings of other 8(a)(1) violations, which the Respondent filed exceptions to, because those violations would be cumulative of the unexcepted-to violations.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Teamsters Local 890; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Salinas, May 20-22, June 25-27, and Aug. 13-15, 2003. Adm. Law Judge John J. McCarrick issued his decision Jan. 8, 2004.

Ryder Memorial Hospital (24-RC-8370; 351 NLRB No. 26) Humacao, PR Sept. 28, 2007. In this case, the Board announced the revision of its official election ballot to explicitly include language that asserts the Board's neutrality in the election process and disclaims the Board's participation in the alteration of any sample ballots. The Board indicated its position that the inclusion of this language will preclude any reasonable impression by employees that the Board endorses a particular choice in any election and, accordingly, it eliminates the need for the Board to engage in a case-by-case evaluation of allegedly objectionable altered sample ballots. Thus, in future cases, the Board will decline to set aside an election based on a party's distribution of an altered sample ballot, provided that the altered sample ballot is an actual reproduction of the Board's sample ballot, i.e., it includes the new disclaimer language; if a party distributes an altered sample ballot from which the disclaimer language has been deleted, however, the Board will consider the deletion intentional, and will deem the altered ballots per se objectionable.

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As the altered sample ballot alleged to be objectionable in this case did not include the Board's new disclaimer language, the Board applied extant precedent requiring a case-specific evaluation of the nature and contents, and circumstances of the distribution of, the altered sample ballot. See *3-Day Blinds*, 299 NLRB 110 (1990); *SDC Investment*, 274 NLRB 556 (1985). Pursuant to that analysis, a panel majority concluded that the altered sample ballot was not objectionable. In so concluding, the panel majority relied on the facts that, inter alia, the ballot

was distributed by the Petitioner by the same method it used to distribute other campaign propaganda, various markings on the ballot indicated that the document was a photocopy of the Board's sample ballot, the ballot contained a portion of the disclaimer language appearing on the Board's Notice of Election, and the Employer had posted copies of the Board's Notice of Election (containing disclaimer language) at various locations throughout its facility. Chairman Battista indicated that, consistent with his dissenting opinion in *Oak Hill Funeral Home and Memorial Park*, 345 NLRB No. 35 (2005), he would have found the altered sample ballot to be objectionable.

(Chairman Battista and Members Schaumber and Walsh participated.)

The Painting Co. (9-CA-33482, et al.; 351 NLRB No. 6) Columbus, OH Sept. 27, 2007. The main issue before the Board in this supplemental decision was the reasonableness of the formula used in the compliance specification to calculate backpay for discriminatees Charles Crisp, Warren Hull, Robert Meade, and Mark Pratt. The administrative law judge found the Region's calculation was reasonable and ordered the Respondent pay discriminatees Crisp, Meade, and Pratt amounts totaling \$183,387, plus interest. The judge ordered that the backpay due to discriminatee Warren Hull, whose whereabouts are unknown, be placed in escrow with the Regional Director for one year. [\[HTML\]](#) [\[PDF\]](#)

Contrary to the judge, the Board concluded that the General Counsel failed to establish that the Region's backpay calculation was reasonable and reversed the judge's finding. The Board recomputed the backpay to more closely approximate the amount the discriminatees would have earned had they not been unlawfully discharged and ordered the Respondent to pay the three discriminatees amounts totaling \$63,522, plus interest. Chairman Battista and Member Schaumber found that the calculation of backpay for a missing discriminatee raises significant legal and policy issues. Accordingly, they severed the backpay issue related to discriminatee Hull and remanded the matter to the Regional Director to further investigate his whereabouts and resolve the issue pursuant to the Supplemental Decision. *Parts Depot, Inc.*, 348 NLRB No. 9 (2006). In Member Liebman's view, Hull's gross backpay was approximately determined under extant law and should be placed in escrow. *Starlite Cutting, Inc.*, 284 NLRB 620 (1987).

In 2000, the Board found that the Respondent, a painting contractor, violated Section 8(a)(3) and (1) by discharging the discriminatees on Jan. 2, 1996 and ordered that they be made whole for their losses. *The Painting Co.*, 330 NLRB 1000 (2000), enfd. 298 F.3d 492 (6th Cir. 2002). The compliance specification calculation assumed that the discriminatees would have worked continuously and exclusively for the Respondent during each year of the 6-year backpay period which ended on April 1, 2002. To derive yearly lost earnings for the discriminatees, the specification extrapolated annualized earnings for all of the Respondent's painters from their actual earnings (regardless of the number of days they worked) and then averaged those extrapolated earnings.

The Respondent's evidence showed that most of its painters worked neither continuously nor exclusively for the Respondent during the backpay period. During the back pay period, the Respondent employed 350 painters for various periods of time. Only 5-12 painters in a given year worked what could be considered a full year. The 6-year average annual number of workdays was only 91 and ranged from 63 workdays in 1996 to 130 workdays in 2001. Thus, the Board concluded that the backpay formula was unreasonable because very few painters worked a full year for the Respondent, yet the specification assumed that to be the standard.

The Board held that, absent evidence that the discriminatees would have worked more than the average number of workdays, the most accurate method to determine their backpay was to assume the discriminatees would have worked the same number of workdays and would have had the same annual earning as the average painter the Respondent employed. The Board presumed that the average workdays occur in one or two consecutive calendar quarters because most painters worked in consecutive periods during the year. The Board further found it reasonable to consider 65 workdays as representing the number of workdays in a full calendar quarter given that the average number of workdays each year was so few.

To compute net backpay, the Board's revised formula offset between one and two quarters of the discriminatee's interim earnings, depending on the average number of workdays for that year. For 1996 and 2002, when the average number of workdays was respectively 63 and 65, one full quarter of interim earnings is offset. In 2001, when the average was 130 workdays, the offset is two full quarters. In the other years, with more than 65 workdays but less than 130, the offset amount equals one full quarter plus a percentage of the discriminatee's quarterly interim earnings.

The backpay for discriminatees Crisp, Meade, and Pratt was recalculated based on the revised formula. Two other discriminatees, whose backpay amounts the Respondent conceded the Region had correctly calculated, are included in the Board's Order Remanding in Part.

(Chairman Battista and Members Liebman and Schaumber participated.)

Hearing at Columbus, May 19-20, 2003. Adm. Law Judge Joseph Gontram issued his decision Sept. 8, 2003.

Toering Electric Co. (7-CA-37786, et al.; 351 NLRB No. 18) Muskegon, MI Sept. 29, 2007. The Board, in a 3-2 decision, ruled that an applicant for employment must be genuinely interested in seeking to establish an employment relationship with the employer in order to qualify as a Section 2(3) employee and thus be protected against hiring discrimination based on union affiliation or activity. The Board explained that "one cannot be denied what one does not genuinely seek." The Board further held that the General Counsel bears the ultimate burden of proving an individual's genuine interest in seeking to go to work for the employer. [\[HTML\]](#) [\[PDF\]](#)

The Board majority of Chairman Battista and Members Schaumber and Kirsanow held in *Toering* that the presumption that any individual who submitted an application was entitled to protection was inconsistent with the text of the Act and its basic purposes. Only applicants who are statutory employees within the meaning of Section 2(3) are entitled to protection against hiring discrimination, and statutory employee status, in turn, requires the existence of “at least a rudimentary economic relationship, actual or anticipated, between employee and employer.” *WBAI Pacifica Foundation*, 328 NLRB 1273, 1274 (1999). No such economic relationship is anticipated in the case of applicants with no genuine aspiration to work for an employer. Thus, job applicants without a genuine interest in an employment relationship are not employees within the meaning of Section 2(3).

Although some salts, paid or unpaid, may genuinely desire to work for a nonunion employer and to proselytize co-workers on behalf of a union, other salts clearly have no such interest. According to the Board, “submitting applications with no intention of seeking work but rather to generate meritless unfair labor practice charges is not protected activity. Indeed, such conduct manifests a fundamental conflict of interests ab initio between the employer’s interest in doing business and the applicant’s interest in disrupting or eliminating this business.” Such conduct, the Board observed, also collides with the employer’s right, recognized by the Supreme Court, to insist on employee loyalty and on a cooperative employee-employer relationship. *NLRB v. IBEW Local 1229 (Jefferson Standard)*, 346 U.S. 464, 472 (1953).

For these reasons, the Board imposed on the General Counsel in all hiring discrimination cases the burden of proving that the alleged discriminatee was genuinely interested in seeking to establish an employment relationship and was thereby qualified for protection as a Section 2(3) employee. The Board explained that this requirement embraces two components:

(1) there was an application for employment, and (2) the application reflected a genuine interest in becoming employed by the employer. As to the first component, the General Counsel must introduce evidence that the individual applied for employment with the employer *or* that someone authorized by that individual did so on his or her behalf.As to the second component (genuine interest in becoming employed), the employer must put at issue the genuineness of the applicant’s interest through evidence that creates a reasonable question as to the applicant’s actual interest in going to work for the employer. In other words, while we will no longer conclusively presume that an applicant is entitled to protection as a statutory employee, neither will we presume, in the absence of contrary evidence that an application for employment is anything other than what it purports to be.

The Board concluded that although some evidence in *Toering* suggested the alleged discriminatees’ genuine interest in seeking employment, other evidence suggested the opposite. In these circumstances, the Board remanded this case to the judge in order to apply the new analytical framework to the facts of this case.

Members Liebman and Walsh, dissenting, would have retained without modifications the standard for litigating hiring discrimination cases set forth in *FES*, 331 NLRB 9 (2000), supplemented 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002). They commented that the Board's decision in *Toering*, reached without the benefit of briefs, oral argument, or even a request to reconsider precedent, "continues the Board's roll-back of statutory protections for union salts who seek to uncover hiring discrimination by non-union employers and to organize their workers" by legalizing hiring discrimination in some, perhaps many, cases involving salts.

In the dissent's view, the majority's new approach cannot be reconciled with the Act, its policies, or Supreme Court precedent. They pointed out that in *Phelps Dodge*, the Supreme Court stated that

Discrimination against union labor in the hiring of men is a dam to self organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which ... is recognized as basic to the attainment of industrial peace.

According to the dissent, the Act's aims are, therefore, furthered by finding unlawful an employer's refusal to hire or consider an applicant because of his union affiliation, even where it cannot be established that an applicant would have accepted a job if offered.

The dissent noted that Section 2(3) and 8(a)(3) make clear that the employer's motive, and not the applicant's intentions, is the proper focus in cases like this one. If Congress had intended to exclude "non-genuine" job applicants, they argue, it presumably would have done so. Instead, Congress has repeatedly declined to enact numerous anti-salting bills in the 12 years since the Supreme Court decided *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995) (unanimously approving Board's holding that paid union organizers who seek employment are statutory employees).

The dissent further stated that the majority's new standard, even considered on its own terms, is critically flawed because it fails to provide clear guidance with respect to determining an applicant's genuine status. Moreover, they observe that the new standard places an unfair burden on the General Counsel by allowing an employer to first raise the genuineness issue during the unfair labor practice hearing. And, they argue, it will both spawn and prolong the course of litigation by creating a new fact-intensive defense.

The dissenters summarized their disagreement with the majority in the following terms:

By any measure, today's decision represents a failure in the administration of the National Labor Relations Act. The majority unnecessarily overturns carefully considered precedent and implements an untenable approach that will not even accomplish the majority's professed goals. Worse, the Board now creates a

legalized form of hiring discrimination, a step that would have been considered unthinkable by the *Phelps Dodge* Court when it held that the prevention of hiring discrimination against union members was “the driving force behind the enactment of the National Labor Relations Act.” 313 U.S. at 186. Because we still believe that it is crucial to the Act’s basic mandate to uncover and redress discrimination against union members, we dissent.

(Full Board participated.)

Adm. Law Judge Arthur J. Amchan issued his supplemental decision Sept. 29, 2000.

Tribune Publishing Co. (17-CA-21700; 351 NLRB No. 22) Columbia, MO Sept. 28, 2007. The Board affirmed the administrative law judge’s finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally terminating the use of its direct-deposit system for the deduction of union dues. In this case, after unilaterally ceasing dues checkoff upon the expiration of the parties’ collective-bargaining agreement, the Respondent reached a new agreement with the Union to allow employees to use its direct-deposit system for the deduction of their union dues. After conducting a full trial run of the system for that purpose and implementing direct deposit for a full pay period, the Respondent unilaterally terminated the use of direct deposit for union dues. The Board found that, by allowing employees to use direct deposit for this purpose, the employer had established a term and condition of employment that was a mandatory subject of bargaining, and by failing to bargain, the Respondent violated Section 8(a)(5) and (1). The Board also found that the Respondent’s employee handbook, which provided for the direct-deposit system, did not permit the Respondent to unilaterally interpret and modify that system. [\[HTML\]](#) [\[PDF\]](#)

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Graphic Communications Local 16-C; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Columbia, Jan. 16, and 17, 2003. Adm. Law Judge William N. Cates issued his bench decision Feb. 5, 2003.

United States Postal Service (15-CA-17506(P); 351 NLRB No. 23) Destin, FL Sept. 28, 2007. The Board denied the Respondent’s motion for reconsideration of its Decision and Order issued on June 28, 2007 (350 NLRB No. 12). In that decision, the Board affirmed the finding of the administrative law judge that the Respondent violated Section 8(a)(1) of the Act by threatening an employee with a lawsuit and unspecified reprisals because he had filed an unfair labor practice charge with the Board. In denying the motion for reconsideration, the Board found that the Respondent had not raised any extraordinary circumstances warranting reconsideration. [\[HTML\]](#) [\[PDF\]](#)

(Chairman Battista and Members Liebman and Walsh participated.)

Wal-Mart Stores, Inc. (19-CA-27720; 351 NLRB No. 17) Wasilla, AK Sept. 28, 2007. The Board, in a 2-1 decision, reversed the administrative law judge's supplemental decision that the Respondent did not violate Section 8(a)(1) of the Act by discharging employee Kenneth Stanhope because he refused to attend an investigatory interview without a witness. [\[HTML\]](#) [\[PDF\]](#)

At the time that the Respondent, whose employees were not represented by a union, denied Stanhope his request for a witness, Stanhope in fact had the right to such a witness. *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), enfd. in relevant part 268 F.3d 1095 (D.C. Cir. 2001), cert. denied 536 U.S. 904 (2002). Accordingly, the judge found that the denial of a witness and the discharge for Stanhope's refusal to attend the meeting violated the Act under *Epilepsy*.

However, while the judge's decision was pending before the Board, the Board reversed *Epilepsy* in *IBM*, 341 NLRB 1288 (2004), holding that non-unionized employees did not have the right to such a witness. Consequently, in *Wal-Mart I*, 343 NLRB 1287 (2004), the Board applied *IBM* retroactively and reversed the judge's finding that the denial of the witness violated the Act, but remanded on the discharge for the judge to determine whether the Respondent discharged Stanhope for requesting a witness or for refusing to attend the interview without a witness. After that decision, the Charging Party filed a motion for reconsideration, requesting the Board to not apply *IBM* retroactively because it would cause "manifest injustice." The Board held the motion in abeyance as to the discharge because if the judge determined that Stanhope was discharged for simply requesting a witness, still protected under *IBM*, there would be no need to determine whether *IBM* should be applied retroactively.

In his supplemental decision, the judge found that Stanhope was discharged for both requesting a witness and refusing to attend the interview without one, but that the refusal to attend the interview, unprotected under *IBM* and thus insubordination, was most central. Accordingly, the judge found that the Respondent did not violate the Act by discharging Stanhope. The judge's decision thus squarely presented the Board with the decision to apply *IBM* retroactively.

The Board first analyzed the case as if *Epilepsy*, the law at the time, was controlling, and found that Stanhope's refusal to attend the interview without a witness was protected and thus his discharge was unlawful. The Board applied the framework of *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 f.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and found that Stanhope's refusal to attend the interview without a witness was a motivating factor in his discharge. The Board relied on the fact that Co-Manager Bruce Manderson admitted that Stanhope's refusal to attend the interview without a witness was a factor in his discharge. The Board then found that the Respondent failed to carry its *Wright Line* burden in proving that it would have discharged Stanhope even in the absence of his protected activity. The Board relied on Manderson's admission and on the fact that the Respondent could not prove that it would have discharged

Stanhope for the underlying conduct that triggered the investigatory interview: profanity and upsetting a co-worker. Accordingly, the Board found that under *Epilepsy*, Stanhope's discharge was unlawful.

The Board then found, under *SNE Enterprises, Inc.*, 344 NLRB 673 (2005), that to apply *IBM* retroactively to this case would cause "manifest injustice." The Board applied the three factors of *SNE* and found that Stanhope "relied" on pre-existing law, i.e., *Epilepsy*, that the "purposes of the Act" would be accomplished by not retroactively applying *IBM* because otherwise employees would be discouraged from exercising their rights and employers would be encouraged to violate the Act, and that a "particular injustice" would result because Stanhope would be discharged for relying on his rights at the time. Weighing all these factors, the Board found that applying *IBM* retroactively here would cause a manifest injustice. Accordingly, the Board granted the motion for reconsideration, applied the existing law at the time, *Epilepsy*, and found that the Respondent violated Section 8(a)(1) of the Act by discharging Stanhope for refusing to attend the investigatory interview without a witness.

In dissent, Chairman Battista stated that the Board had found no "extraordinary circumstances" warranting reconsideration, but rather had simply changed its mind about retroactively applying *IBM*. Chairman Battista also stated that the Board's original decision was quite consistent with the Board's principles on retroactivity, particularly as applied in *Epilepsy*. Chairman Battista found that *Epilepsy* was indistinguishable from the instant case in that all the retroactivity factors favored retroactive application of *IBM*: there was no evidence that Stanhope had relied on pre-existing law; *IBM* is Board policy and failing to apply it frustrates the Board's effectuation of that policy; and discharging Stanhope under *IBM* is no more unjust than saddling the employer in *Epilepsy* with reinstatement and backpay after it had followed pre-existing law. According to the Chairman, the Board's decision was not reasoned decision-making.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Food and Commercial Workers; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Anchorage, Alaska, June 27-28, 2002. Adm. Law Judge Burton Litvack issued his decision Nov. 8, 2002.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Lorne G. Seifert, Inc. (Carpenters Greater Pennsylvania Regional Council) Dillsburg, PA Sept. 24, 2007. 5-CA-33393; JD-61-07, Judge John T. Clark.

Electrical Workers IBEW Local 716 (Wayne Electric) (Individuals) Houston, TX Sept. 25, 2007. 16-CB-7421, et al.; JD(ATL)-27-07, Judge John H. West.

California Gas Transport, Inc. (Teamsters State of Arizona Local 104) Nogales, AZ Sept. 26, 2007. 28-CA-21287; JD(SF)-28-07, Judge James M. Kennedy.

Maclean Power Systems d/b/a Maclean-Dixie (Steelworkers) Birmingham, AL Sept. 27, 2007. 10-CA-36799; JD(ATL)-31-07, Judge Keltner W. Locke.

KSM Industries, Inc. (Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Industrial and Service Workers Local 2-779) Milwaukee, WI Sept. 27, 2007. 30-CA-13762, et al.; JD-63-07, Judge David I. Goldman.

Case Farms of North Carolina, Inc. (Western North Carolina Workers' Center) Morganton, NC Sept. 28, 2007. 11-CA-21378, 21379; JD(ATL)-30-07, Judge John H. West.

KR Drenth Trucking, Inc. d/b/a TK Services, Inc. (Teamsters Local 135) Chicago, IL Sept. 28, 2007. 25-CA-29863, et al.; JD-64-07, Judge Earl E. Shamwell Jr.

Diversified Services Group, Inc. (Public Service Employees Local 572, a/w Laborers) Silver Spring, MD Sept. 28, 2007. 5-CA-33333; JD-65-07, Judge Michael A. Rosas.

Teamsters Local 414 (Fidler, Inc., d/b/a Aggregate Industries – Central Region) Fort Wayne, IN Sept. 28, 2007. 25-CP-209; JD-66-07, Judge Michael A. Rosas.

NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

General Kinetics, Inc. and/or General Kinetics, Inc. (Electrical Workers [IBEW] Local 459) (6-CA-35509; 351 NLRB No. 10) Johnstown, PA Sept. 28, 2007. [\[HTML\]](#) [\[PDF\]](#)

TEST OF CERTIFICATION

(In the following cases, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

American University (Teamsters Local 922) (5-CA-33699; 351 NLRB No. 7) Washington, DC Sept. 25, 2007. [\[HTML\]](#) [\[PDF\]](#)

FedEx Home Delivery, a Separate Operating Div. of FedEx Ground Package System Inc. (Teamsters Local 25) (1-CA-44037, 44038; 351 NLRB No. 16) Wilmington, MA Sept. 28, 2007. [\[HTML\]](#) [\[PDF\]](#)

**LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS
IN REPRESENTATION CASES**

*(In the following cases, the Board considered exceptions to
Reports of Regional Directors or Hearing Officers)*

**DECISION AND ORDER REMANDING [matter to
Regional Director for further appropriate action]**

Albertson's, Inc., Ontario, OR, 36-RC-6194, Sept. 29, 2007 (Members Schaumber and
Kirsanow; Member Walsh dissenting)

*(In the following cases, the Board adopted Reports of
Regional Directors or Hearing Officers in the absence of exceptions)*

DECISION AND CERTIFICATION OF REPRESENTATIVE

Century Steel LLC, Chicago Heights, IL, 13-RC-21607, Sept. 24, 2007
(Chairman Battista and Members Liebman and Walsh)

**DECISION AND DIRECTION
[that Regional Director open and count ballots]**

Research Foundation of the City University of New York, New York, NY, 2-RC-22721,
Sept. 26, 2007 (Chairman Battista and Members Liebman and Walsh)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Pivotal Staffing Services, LLC, Chicago, IL, 13-RC-21625, Sept. 27, 2007
(Chairman Battista and Members Liebman and Walsh)

*(In the following cases, the Board denied requests for review
of Decisions and Directions of Elections (D&DE) and
Decisions and Orders (D&O) of Regional Directors)*

Gavco Materials, Inc., Charleroi and Uniontown, PA, 6-RC-12594, Sept. 26, 2007
(Chairman Battista and Members Liebman and Walsh)

Rochester City Lines Co., Inc., Rochester, MN, 18-RC-17518, Sept. 26, 2007
(Chairman Battista and Members Liebman and Walsh)

ORDER [denying Employer's request for review of Acting Regional Director's administrative determination to cancel election and hold petition in abeyance pending final disposition of charges in Cases 20-CA-33367 and 20-CA-33471]

Stevens Creek Chrysler Jeep Dodge, Inc., San Jose, CA, 32-RC-5505, Sept. 26, 2007
(Chairman Battista and Members Liebman and Walsh)

ORDER [denying Petitioner's request for review of Acting Regional Director's administrative determination to suspend processing of petition pending resolution of charge in Case 29-CA-28405]

Four Seasons Solar Products, Holbrook, NY, 29-RC-11478, Sept. 26, 2007
(Chairman Battista and Members Liebman and Walsh)

Miscellaneous Decisions and Orders

DECISION ON REVIEW AND ORDER [granting Petitioner's request for review of Regional Director's decision and order, and affirming Regional Director's conclusion that the petition was contract barred and dismissal of petition]

New Hampshire Public Defender, Concord, NH, 1-RD-2102, Sept. 26, 2007
(Chairman Battista and Members Liebman and Walsh)

DECISION ON REVIEW AND ORDER [affirming Regional Director's decision and direction of election for reasons consistent with *Jones Plastic & Engineering Co.*, 351 NLRB No. 11 (2007)]

Radix Wire Co., Euclid, OH, 8-RD-2025, Sept. 28, 2007 (Chairman Battista and Member Schaumber; Member Walsh concurring)
Tyson Foods, Inc., Jefferson, WI, 30-UD-165, Sept. 28, 2007 (Chairman Battista and Member Schaumber; Member Walsh concurring)

DECISION ON REVIEW AND ORDER [affirming Regional Director's dismissal of petition in light of *Dana Corp.*, 351 NLRB No. 28 (2007)]

Cequent Towing Products, Goshen, IN, 25-RD-1447, Sept. 29, 2007
(Chairman Battista and Members Schaumber and Kirsanow)

SUPPLEMENTAL ORDER [granting Employer-Petitioner's withdrawal of request for review]

Chapel 25 Hotel Associates LP d/b/a Hampton Inn & Suites Albany Downtown, Albany, NY, 3-RM-788, Sept. 26, 2007